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BOOK REVIEW COLLOQUIUM:
PUBLIC CHOICE AND CONSTITUTIONAL LAW

Externalities and Other Parasites

Don Herzog[†]

The Strategic Constitution. Robert D. Cooter. Princeton, 2000.
Pp ix, 412.

Constitutional Democracy. Dennis C. Mueller. Oxford, 1996.
Pp xi, 382.

The great—I mean majestic, not splendid—story of recent social science is the implacable advance of economics. Think of it this way: the term *economics* singles out both a distinctive disciplinary methodology and a field of study. The methodology construes individual rationality as constrained utility maximization and tells now familiar stories about how markets harness self-interest and prices assemble far-flung local information¹ to socially efficient ends. The field of study is buying and selling, finance and investment, or, in a word, social practices involving money. And many economists used to take it for granted that their methodology was a tool crafted for their particular field of study. They stayed on their terrain; we stayed on ours; everyone enjoyed reasonably peaceful relations, however seasoned with baleful skepticism or overt contempt on both sides.

But some economists, notably a crew at the University of Chicago, decided that there was no reason to constrain the methodology to that field of study. Armed with the formidable artillery of economic methodology, they started attacking, maybe conquering, one new terrain after another. Not that this maneuver was entirely new. Adam Smith, for instance, sketched something like market competition

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¹ The key paper is F.A. Hayek, *The Use of Knowledge in Society*, 35 Am Econ Rev 519 (1945), in my view a profound text of modern social theory.

among competing Protestant sects—and, for the record, noticed room for the state to improve quasi-market outcomes.² But these forays into other fields are no longer casual or occasional. Now we have organized campaigns.

Constitutional lawyers and political theorists might have imagined themselves secure against the assault, might have pictured themselves on a serene island removed from the combat. That fantasy won't do. The books on offer here are among the lappings of an incoming tide, or, to stick with the jittery military metaphor,³ well past the first beachhead of the assault. Dennis Mueller's *Constitutional Democracy* explores fundamental questions of institutional design, worrying its way through the merits of direct and representative democracy, proportional representation and two party systems, federalism, bicameralism, an independent judiciary, you name it. Robert Cooter's *The Strategic Constitution* features similar breadth, with more emphasis on principal/agent problems and sustained attention to individual rights. Both books promise—or threaten—to take a host of issues traditionally left to political theory and reconstruct them in briskly no-nonsense up-to-date economic terms. It's worth taking stock of where we are, and of what, if anything, economics has to offer.

These are both textbooks, peppered with the sort of remarkable sentences that signal an author's conviction that his readers are exceedingly blank. So Mueller solemnly informs us, "Crime exists everywhere in the world, and has so for all times" (Mueller p 21). What are undergraduates or law students supposed to make of such banalities? (Is it the emissary of the invading army bringing soothing messages of peace?) Even if students aren't *that* blank (how could they be?), teachers thinking of assigning these textbooks need to think hard about what other theoretical approaches their students understand. Initiation into this kind of economic analysis might count as cognitive straitjacketing, even as morally and politically stupefying, if it's the first thing students learn.

As one might also expect of textbooks, their economics, too, is decidedly low tech. Mueller deliberately consigns virtually all his mathematical notation to footnotes, where alas it will convey meaning only to initiates (Mueller p 49). Cooter does a better job incorporating pictures, models, and equations into his text, with enough of the intuitions offered in English to get some readers on board to the more

² See Adam Smith, 2 *An Inquiry into the Nature and Causes of the Wealth of Nations* bk 5, ch 1, pt 3, art 3 at 788–814 (Clarendon 1976).

³ I'd thought, frankly, that this metaphor was whimsically over the top. But in these matters reality outruns spoof: see, innocently and enthusiastically endorsing the metaphor and what it stands for, Edward P. Lazear, *Economic Imperialism*, National Bureau of Economic Research Working Paper 7300 (August 1999). Thanks to Liz Magill for the reference.

formalized presentation. But his pictures are all at the level of a very easy undergraduate microeconomics course. Then again, I doubt that more economically sophisticated treatments will remedy the failings of these books. Precisely because of their crystalline simplicity, they lay bare the basic structure of economic analysis in this domain. Doing so, they expose its confusions and equivocations.

I shall argue that despite the occasional and charmingly belligerent pose struck by some economists of offering a superior alternative to conventional moral and political theory, economics is covertly parasitic on that theory. I begin in Part I by describing some of the core features of economic analysis and by disclosing my own sentiments about that analysis. The description will be terse, the disclosure partial. My aim is to identify, but certainly not pretend to resolve, some thorny methodological issues that surface in these two books. As for the disclosure, well, even if full disclosure were possible, which I doubt, I lack the time and you the patience for any such exercise. I then turn in Part II to scrutinize the authors' deployment of three central economic categories: utility, externalities, and preferences. Over and over, I shall urge, crucial work is being done offstage, not by further unstated economic arguments, but by moral and political theory. And I'll urge further that there seems to be no viable way that a more fully self-conscious economic view could succeed in reducing those offstage principles to its own terms.

I.

I begin with a familiar ambiguity. What does it mean to say that we maximize our utility? In one interpretation, "utility" is strictly speaking self-interested. It is in fact not trivial to sort out what counts as self-interest and why,⁴ but let's stick with rough intuition here. In one interpretation, then, the utility we're maximizing is stuff like money, power, and our own pleasure. In another interpretation, the individual's "utility" is whatever she happens to value. It might be strictly speaking self-interested stuff, but the theory doesn't require that. It might be altruistic. Or it might be any number of candidates

⁴ See Stephen Darwall, *Self-Interest and Self-Concern*, 14 Soc Phil & Pol 158, 175 (1997), seems to me promising but off the mark. Darwall proposes that we construe your self-interest as what someone who loves you would wish for you. Surely this is overinclusive: a father who loves his child wishes her to become a caring individual, capable of being motivated by principle absent any further payoff; and not just because of his regard for third parties, but because she will be a narrow-minded, despicable wretch if she isn't so motivated. For similar reasons it seems underinclusive, too: someone who loves you might have grave reservations about something you're ardently pursuing, might think it tawdry or worse, and so might not want you to succeed in it, even though given your current identity and projects it is in your interest to succeed. On connected issues, see Connie Rosati, *Persons, Perspectives, and Full Information Accounts of the Good*, 105 Ethics 296 (1995).

outside the chafing confines of self-interest against altruism.⁵ Consider for instance disinterested obsequiousness, explored in gruesome loving detail in Western literature: I mean the trait exhibited by the lick-spittle wretch who sucks up to other people who can't conceivably help him out, who abases himself simply for the sake of doing so. Even this wretch, in the second interpretation, can be seen as maximizing his utility. His utility just consists in, is defined by, being as obsequious as he can be, without any further benefit accruing to him.

It matters which interpretation we adopt. So consider Mother Teresa doing her saintly work. In the first interpretation, we have an explanatory puzzle: what's in it for her? Here's an agent who takes vows of poverty and chastity, who hurls indomitable energy into helping miserably poor people who don't seem to be able to reciprocate. So we cast around for illuminating if subversive explanations. Perhaps she is secretly gunning for the Nobel Peace Prize and all the honor and cash it will bring her. Or perhaps she imagines that countless third parties will be so stunned by her virtues that they'll rush to shower her with goodies. (But then we need an account of why her traits would count as virtues, else we've merely pushed the explanatory dilemma back one level. And if we're serious about self-interest, we need her to squirrel away the goodies for herself, not shower them, too, on the wretched poor.) In the second interpretation, there's no puzzle at all, because invoking utility maximization leaves wholly open what an individual's utility consists in. She happens to derive utility in ways most of us don't, that's all: some people choose to wash lepers' feet, some don't; nothing more remains to be said about it. This interpretation of utility maximization led to Macaulay's priceless sneer: "it is . . . idle to attribute any importance to a proposition, which, when interpreted, means only that a man had rather do what he had rather do."⁶

Economic accounts routinely wobble between these two interpretations of utility maximization. At some point in the story, one senses that the account is following the first interpretation, motored by misanthropic glee: the agents in question all seem single-mindedly devoted to pursuing their own profit or power or pleasure. One objects—surely there's more to it than that!—and the economist back-

⁵ For an incisive and amusing catalogue, consider Stephen Holmes, *The Secret History of Self-Interest*, in Jane J. Mansbridge, ed, *Beyond Self-Interest* 267 (Chicago 1990).

⁶ Thomas Babington Macaulay, *Mill's Essay on Government: Utilitarian Logic and Politics*, 49 Edinburgh Rev 159, 186 (1829), most conveniently available in Jack Lively and John Rees, eds, *Utilitarian Logic and Politics* 97, 125 (Clarendon 1978). This volume collects the dispute over James Mill's *Essay on Government*, an early bit of rational-choice theorizing about politics that Mueller and Cooter seem not to know. The dispute is worth sustained study, and not because Macaulay wins hands down.

tracks to the second interpretation, saying patiently, “no, by utility maximization I just mean the formal structure, any content will do.” But then, within minutes—or paragraphs—we find ourselves right back to the first interpretation.

Is the second interpretation wholly formal, even vacuous? No. (Never rely too heavily on a form/content distinction.) Even the apparently innocuous axioms required by von Neumann-Morgenstern utility analysis impose some shape, some structure,⁷ and I want to leave open the possibility that plenty of human action, rational by my lights anyway, doesn’t fit that structure. To take a quick and controversial example, consider the agent who acts on the maxim always to treat others with respect. She doesn’t maximize her respect for others subject to any budget constraints; she insists on meeting a threshold. Nor is she willing to trade off expressions of respect for other goods: she will not use or abuse another agent to make \$5, or \$500, or \$5,000,000. Her respect colors all her dealings with others. The merits of that example aside, even enthusiastic economists can’t believe that constrained utility maximization is infinitely pliable, that it will accommodate anything. If it were so vacuous, there’d be no story as to how we could get tradeoffs at the margin, the relevant kinds of sensitivity to risk and uncertainty and time and the like, up and running. So even economists who stick to the second interpretation of utility maximization have assumed *something* about the nature of rational action, and the assumption is not wholly benign. That means Macaulay wasn’t quite right to think that the second construction is coextensive with voluntary action.⁸

A connected equivocation: Economists adore the fact/value gap. (I do not, for unvarnished pragmatist reasons.) They ordinarily insist that their views are offered as “positive theory,” merely descriptive or explanatory. But in their social welfare function appearances onstage, they want to be normative. The problem here is that the allegedly “positive” views themselves often teeter insensibly into being “normative,” in part because *rationality* has what fact/value types might call commendatory force. Economists are free to stipulate that their construction of rationality is purely descriptive and leave open the questions of when or whether any of us should behave in its terms. But one

⁷ For a crisp presentation of the relevant axioms, see Donald Davidson, J.C.C. McKinsey, and Patrick Suppes, *Outlines of a Formal Theory of Value*, 1, 22 *Phil of Sci* 140, 152–57 (1955).

⁸ See note 6.

⁹ See, for example, Hilary Putnam, *Reason, Truth and History* (Cambridge 1981). A very quick insight into the problem with the dichotomy: a fact is just something rational to believe, but here rationality has to be a fully normative notion; what’s more, it seems doubtful that we can cabin off narrowly epistemic virtues from moral and political principles. Note for instance that we think it rational to endorse the findings of communities of enquirers practicing free speech and including people with diverse points of view.

often sees people fumble here. Students are especially prone to fumbling, so they need textbooks emphatically clear and careful about these matters.

Next: Economic rationality is suffering from the tyranny of ends, a view with a long, distinguished lineage. Ends are given, the thought is, and rationality is concerned only with their efficient pursuit. Thus Hobbes: “[T]he Thoughts, are to the Desires, as Scouts, and Spies, to range abroad, and find the way to the things Desired”¹⁰ Thus Hume: “Reason is, and ought only to be the slave of the passions, and can never pretend to any other office than to serve and obey them.”¹¹ But we want to be able to assess the rationality of ends. Economists can make some half-hearted gestures in that direction. Perhaps some end is really an intermediate means to an even higher end. Or you might rationally relinquish an end on figuring out that attaining it would require you to surrender too much of other ends you value. But imagine someone with bizarre ends, someone say who wants to devote his life to keeping his shoes as clean as he can, never stepping on the cracks on the sidewalk, and devouring stale doughnuts and bad coffee in airport terminals, especially on Tuesdays. We want to be able to say, look, none of this is worth doing, none of it adds up to human happiness or welfare or a life worth living. Not that it doesn’t causally produce higher ends that we imagine the agent values, but that a happy life, a life worth living, is an abstract idea that has to be interpreted, and we can’t recognize as intelligible or choiceworthy any interpretation that would saddle an agent with such silly ends, absent some special further story.¹²

It’s too easy for economists to shrug and say, *de gustibus non est disputandum*.¹³ Better to take that maxim as referring strictly to tastes. If you order vanilla ice cream and the guy behind you in line snorts derisively and says, “listen, buddy,” or, “look, lady, that’s a really dumb mistake, chocolate is better,” you’re entitled to display your command of Latin. You need no justification for your choice, and it’s hard to imagine what the justification could consist in, past the observation that you feel like having vanilla, or you like the way it tastes. If the meddler persists and says extravagant things like, “chocolate is objec-

¹⁰ Thomas Hobbes, *Leviathan* 53 (Cambridge 1991) (Robert Tuck, ed).

¹¹ David Hume, *A Treatise of Human Nature* bk 2, pt 3, § 3 at 415 (Clarendon 2d ed 1978) (P.H. Nidditch, ed).

¹² These issues arise in construing *eudaimonia* in Aristotle’s *Ethics*. See, for instance, J.L. Ackrill, *Aristotle on Eudaimonia*, 60 *Proceedings of the British Academy* 339 (1974), reprinted in Amélie Oksenberg Rorty, ed, *Essays on Aristotle’s Ethics* 15 (California 1980); John M. Cooper, *Reason and Human Good in Aristotle* (Harvard 1975).

¹³ See George J. Stigler and Gary S. Becker, *De Gustibus Non Est Disputandum*, 67 *Am Econ Rev* 76 (1977), which raises other difficulties in its suggestions that preferences are largely stable and similar among different people.

tively better,” or, “chocolate has qualities that extort the allegiance of rational agents as such,” or, “a universe without chocolate, or without people ingesting chocolate, is an impoverished universe, but a universe without vanilla is better,” or, in a different idiom, “the revolutionary workers’ committee will smash the boring vanilla lobby to smithereens!” you’re still entitled to brush him off. But lots of things aren’t tastes or preferences in *that* sense. In any arena of evaluative assessment, there’s real room for criticism, argument, and justification. Here reasons can and should be given, at least to certain parties, on certain occasions. (You owe your colleagues justifications for supporting or opposing a new faculty member or a curricular change. But you might sensibly stiff-arm a nosy provost, to preserve your jurisdiction. And you might think a colleague who reopens the debate over the Thursday night poker game is being a boor.) And things don’t naturally fall into place as matters of preference or not. Politically savvy wine connoisseurs, for instance, might accomplish the conceptual and social transformations required to make judgments of wine for us, as for them, anything but mere matters of taste. (And we can argue in turn about whether that transformation would be progress. Are we better off as people who can make mistakes about the goodness of wine? as people who actually understand and care about the extravagant lexicon of wine-appreciating adjectives?)

Wherever there is evaluative assessment, preference (or utility) and evaluation can diverge. Take music. Today’s or yesterday’s pop bands—Barenaked Ladies, say—sell countless more compact discs every day than Béla Bartók or Eric Dolphy. But it is absurd to infer that the pop bands are producing better music. If, miraculously, Dolphy hits the top of the charts next week, if—choose your currency unit—he gets more hours’ airplay on American stereos, it would be patently absurd to infer that his music has gotten better. It will be the same as it’s always been. The surge in preferences for Dolphy might arise because people noticed—or learned—that his music is good. (Not just good, come to think of it; sublime.) But even then preference needn’t track quality. Maybe Dolphy’s new popularity would be just a passing fad.

Indeed one can coherently prefer something precisely because it is worse. Take the familiar phenomenon of slumming it. Craig Claiborne reputedly relished a Coney Island hot dog with all the fixings once a year. Not that its fat or sodium content made it off limits for him: that would give him a pressing reason to abstain, whether he preferred to or not. But that it was delightful to indulge in now and again precisely because it is such wretchedly awful food. (Notice the range of possible motivations on offer here: condescending amusement at temporarily doffing the garb of a lower social class, secure in the

knowledge that it's only temporary, heightened by the ignorance of vendor and passersby that he is, after all, Craig Claiborne; enjoyment at the saucy insistent vulgarity of the hot dog's taste, the ridiculous burst of salty fatty slime with each bite explosively puncturing the skin, all of it far removed from the subtler seasonings and flavors and juices and textures of *haute cuisine*; and so on. Notice how sociologically rich these motivations are, how much is lost and flattened in saying that Claiborne occasionally preferred a hot dog. Are you confident that what's lost and flattened is politically irrelevant?) For Claiborne, judgments about food were not mere *de gustibus* preferences. As a general matter, it will follow that preferences are strictly speaking irrelevant to assessing value.

Next: Should economic analysis work outside the terrain of markets? Consider two alternative explanations of why economic analysis has such remarkable purchase in markets. One: Constrained utility maximization is just what rational agents do. It is at bottom a psychological picture of the individual. Perhaps there's static on the channel; perhaps people make outright mistakes in calculating; or perhaps they satisfice, that is, they take an alternative which is merely good enough.¹⁴ Still, in this view, there's no reason *ex ante* to restrict the theory to market settings—and the modesty of earlier economists seems an unprincipled restriction of the domain of the theory, and we should apply it in one social setting after another, marching inexorably ahead.

Two: Constrained utility maximization is permitted or elicited or reinforced by markets. It is at bottom a sociological dynamic, dependent not on the interior workings of the human mind but on the workings of particular social settings. Consider the evolutionary picture of markets offered some time ago by Nelson and Winter.¹⁵ Suppose that alert consumers are intent on getting the best deal they can, but that firms are behaving at random. Then we can show that still additional cash will flow to firms that happen to be doing a more efficient job satisfying consumer demand. This picture gets us past thinking that entrepreneurs or managers must be individually driven to try to make more money, though it still relies on utility-maximizing individuals to get markets to do their work of efficiently allocating resources. (If consumers *and* firms are stumbling around in the dark, no magic will produce efficient outcomes.)

We can continue in the same vein by softening what we expect of individual consumers. We need only a relatively small group of con-

¹⁴ See Herbert A. Simon and Joseph B. Kadane, *Optimal Problem-Solving Search: All-or-None Solutions*, in Herbert A. Simon, *1 Models of Bounded Rationality: Economic Analysis and Public Policy* 248 (MIT 1982).

¹⁵ See Richard Nelson and Sidney Winter, *An Evolutionary Theory of Economic Change* (Belknap 1982).

sumers to respond to shifting incentives at the margin for markets to work. Some of us may be mechanically habitual or fiercely loyal customers of Starbucks, who will go on swilling their brew whatever happens to its price or quality. Leave aside the second-order pictures of why our fidelity might be rational (search costs are high, say, or our time is better spent on more pressing calculations) and just accept that we're not being orderly little utility-maximizers. Others of us may be similarly habitual or loyal customers of Peets, or (horrors) Folger's Crystals, or whatever else. But if some consumers—the number can be quite small, depending on the size of the marginal shifts we're imagining and the revenues involved—are paying lots of attention, monitoring price and quality, moving freely among different brands, markets will go on doing their work. Indeed, on Albert Hirschman's persuasive argument, markets work *better* if lots of individuals are doggedly habitual or loyal. That way a firm beginning to blunder has a cushion to rely on while it fights back, instead of instantly being driven out of business.¹⁶

Notice finally that markets are like any other social setting, saturated in all kinds of norms. To paint with a grotesquely broad brush, market norms license or encourage financially self-interested behavior. Recall the slogans: "greed is good," or "to get rich is glorious." Here arise two questions, one explanatory, one justificatory. Can in fact norms as a general matter be explained as arising from the actions of self-interested individuals? And can norms as a general matter be justified on the grounds that they make self-interested individuals better off? (We pragmatists have strategies to blur the distinction between these two questions, but let's leave them aside for now and assume the questions are in some fundamental way distinct.) The answer to each question, I believe, is no, but it's also characteristic of economists to assume that the answers must be yes. The thought is that we are on secure footing when we talk of utility maximization, that that is somehow primitive or basic, and that in principle other things need to be reduced to it. But I see no reason to believe that. The selfish person looks askance at Mother Teresa and demands, why are you doing these things? But Mother Teresa, if we may credit her with moments of peevishness, might press the same demand against the selfish person. Their dispute could be glossed as "explanatory" or "justificatory," as "positive" or "normative," or, without the scarecrow binary distinctions, as a dispute about what's worth doing and why. In that dispute, again, I see no reason to imagine that the selfish person is on secure ground.

¹⁶ See Albert O. Hirschman, *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States* ch 7 at 76–105 (Harvard 1970).

On the second, sociological view, which as you have surmised is my view—is, I think, the only sane view in town—there is no reason to cast utility maximization, or preference satisfaction, or the methodical pursuit of self interest, or any such category as the really real, the motor driving human action. Just consider other social settings: the church, science, the family, the Kiwanis, and so on. They don't look like markets. They might not share the formal structures that allowed Nelson and Winter¹⁷ to make an evolutionary argument: an appalling number of recent evolutionary arguments in the social sciences are just hand waving, because they lack any plausible account of selection and transmission mechanisms. They aren't saturated with norms licensing or encouraging any conception of self-interest. Plunked down in such settings, our old friend the economically rational agent looks like a moron, his actions repulsive, even unintelligible, and not only for the reasons famously noticed by Amartya Sen.¹⁸

Recall here one of the pioneering efforts of Chicago-style imperialism, Gary Becker's *A Treatise on the Family*, exploring a host of household decisions through the lens of economic rationality.¹⁹ (I resist the temptation to make a bad joke about seeing through a glass, darkly.) We begin by imagining that you and your partner deal with one another in instrumentally rational, arm's length ways, making deals, bargaining over consumer surplus, and so on. Arguably economics does have a deep, if implicit, theory of justice: to each according to his threat advantage. Suppose now that you actually like washing the dishes after dinner. It's a chance to clear your head and relax, and it's nice, on occasion, to have a well defined task that's worth doing instead of floundering aimlessly at pointless tasks, as you do at work. Suppose too that your partner despises washing the dishes. Each of you knows the other's preferences. Then you could reason this way: "I can extract a lot for agreeing to wash the dishes. In fact I can bump up my price for doing so to just under her reservation price. So I should exploit this asymmetry in our preferences." You then say to her, "listen, I'll do the dishes if you agree to do all the laundry and take the kids on weekends." And then she could reason this way: "Well, I can't say I'm happy with this deal. But I would rather do the laundry and have the kids than face the dishes." So is it a done deal?

An economist might notice that there is a bargaining game here; you're both better off with a wide range of possible deals and the question is which to settle on. You'd actually be happy to do the

¹⁷ See Nelson and Winter, *An Evolutionary Theory of Economic Change* at 206–33 (cited in note 15).

¹⁸ See Amartya Sen, *Rational Fools: A Critique of the Behavioral Foundations of Economic Theory*, 6 Phil & Pub Affairs 317 (1977).

¹⁹ See Gary Becker, *A Treatise on the Family* (Harvard 1981).

dishes all the time if she'd do the laundry half the time and didn't agree to take the kids on weekends, say. But those games are notoriously indeterminate, and the usual Nash solution, splitting the consumer surplus down the middle, has strictly speaking nothing to recommend it from the point of view of economic rationality. ("But isn't it fair?" Maybe. More later.) Or an economist might notice the possibility that on other transactions in the household, she holds considerable threat advantage over you. Perhaps she doesn't mind doing the laundry and you despise it, so she could turn around and propose an extortionate deal there. And perhaps it's jointly efficient to agree never to try to exploit these threat advantages, because you can save on the transaction costs. The problem here is the "perhaps": perhaps dishwashing is actually the only preference asymmetry in the household, and the two of you know it, and the transactions involved are horribly brisk.

Those of us not wholly captured by the allure of economic analysis want to say that it would be despicable to propose such a deal. In even a decent relationship, let alone a good one, you ought to be saying, "no, I'll do the dishes, don't be silly, you hate it." (Arguably you ought to treat your roommate that way, let alone a partner.) So we will be inclined to protest that marriages aren't markets, that economic methodology is misplaced here. An economist can say that your partner's utility enters your utility function. This is to shift to the second interpretation of utility maximization. That is not, I think, adequate as a rendition of what it means to say that marriage or other serious cohabitation arrangements produce a "we" that is more than the sum of its parts.²⁰ But wobbling here is better than sticking with the first interpretation and trying to show relentlessly why it serves your self-interest to refuse to exploit a threat advantage, which is not a pressing explanatory agenda but pernicious fantasy.

To sum up this partial list of my general sentiments about economic analysis: we need to beware equivocations about the meaning of utility maximization, to remember too that even when the content of utility is left wholly open we might want to resist the structure imposed by the theory; we should resist the refusal critically to assess various ends; and we should resist the wholesale application of economic methodology in noneconomic domains on the grounds that they might not be sociologically suited to it. I want to emphasize that

²⁰ On such Hegelian matters, consider Margaret Gilbert, *On Social Facts* (Princeton 1989); Margaret Gilbert, *Living Together: Rationality, Sociality, and Obligation* (Rowman & Littlefield 1996). Cooter is suffering a galloping case of skepticism about corporate intentionality—see for instance Cooter p 266—which I think is systematically mistaken, even though it passes for hard-headed realism even outside economics these days. But I haven't space here to explain what's wrong with the view.

might not, and close this section on a more conciliatory note. Whether a bit of economic methodology illuminates some noneconomic domain is an empirically open question. It can't be held relevant on the general principle that human agency just has this utility-maximizing or decision-theoretic structure, because that's the psychological view I find goofy. Nor can it be held irrelevant on the grounds that we are not *homo economicus* all the way down, in one setting after another. We're not. But we don't know that we're never at all that outside markets, either.

Some of the analytic structures of modern economics—rent seeking, clearing markets, prisoners' dilemmas, coordination games, opportunity cost, principal-agent problems, and so on—ought to be in the toolkit of any self-respecting social or political theorist. But no self-respecting theorist will limit her stock of tools to those being re-tailed by economists, however aggressive their salesmanship, else she'll fall down on the job, lamentably, over and over again.

II.

I turn now more directly to the books under review to explore their limits, and by extension the limits of economic analysis. Let me begin by applying some of the observations above to these texts.

Equivocations On Utility

Both Mueller and Cooter deny, at least officially, that utility always consists in self-interest. But both think it ordinarily does. Mueller assures us, for instance, that “[a] politician’s primary goal is to get elected, and once elected to get reelected” (Mueller p 13).²¹ Not just politicians, he holds, but individuals usually have selfish interests (Mueller pp 50–51, 96). (He wobbles between *preferences* and *interests*. Mere words make a difference when they conventionally mark a distinction we need. And students of constitutionalism and political theory sure do need this one, or so I’ll urge.) Cooter concedes that either self-interest or public interest can enter into someone’s preference ranking or utility function (Cooter p 19). He even remarks “that independent judges base their decisions on their ethical and political philosophies, not their material self-interest” (Cooter p 202). But in closing, he insists on what must be a contingent empirical conjecture: “Perhaps the democratic process occasionally shakes loose from the constraints of self-interest, but these moments occur seldom, if ever” (Cooter p 371). And he says he’s “working strategic theory pure” in a

²¹ For some empirical evidence challenging this now familiar view, see Richard L. Hall, *Participation in Congress* ch 3 (Yale 1996).

deliberately one-sided attempt to focus on self-interest and see what follows (Cooter p 379).

Followers of Milton Friedman's deliciously crass instrumentalism, on which we must never scrutinize the truth of a set of assumptions, only the accuracy of the ensuing predictions,²² are classically embarrassed by the straightforward argument that a rational voter, if this be rationality, would never vote.²³ The odds of your vote determining the outcome of the election are nil. If you voted for Clinton last time 'round, Clinton won; if you voted for Dole, Clinton won; if you voted for Harold Stassen or Pat Paulsen or Angela Davis, Clinton won; if you stayed home, Clinton won. Might as well save your time and stay home. Yes, if everyone did that, weird or bad results might ensue; but everyone doesn't. This familiar line of argument comes as no surprise to Mueller or Cooter. Mueller, oddly, takes it as an opportunity to insert an undigested plea for our obligations as good citizens, without pausing to figure out what this could and should mean in his conceptual world; without pausing to wonder about the cogency of a model that usually relies on self-interest, thinking that that is explanatorily secure, but abruptly invokes good citizenship to get over the occasional explanatory hurdle; without contemplating whether the individuals being modeled themselves turn their good citizenship switches on and off in this way (Mueller p 310). So too, Cooter agrees that even our relatively low voter turnout rates seem to indicate that something besides self-interest is in the mix. The missing ingredient? You got it: Cooter wobbles back to the second, more formal interpretation of utility maximization and opines that maybe people find voting intrinsically satisfying. Or, even worse, perhaps he means that "intrinsic satisfaction" is some pleasantly warm, purring mental state, and one votes to elicit that state, when surely one votes not to feel good but that one feels good, if one does, because one voted and believes that was the right thing to do.

Not that voting is special, from this point of view. Other social practices have the relevant features, in which the individual's marginal contribution makes no difference, so it might seem rational to free

²² See Milton Friedman, *Essays in Positive Economics* pt 1 at 3 (Chicago 1953). An argument or model with false or bizarre premises that consistently produced correct predictions wouldn't be the end of our explanatory labors. It would instead raise further issues to explain: how could it be that a model resting on such premises consistently tracks real outcomes?

²³ Surprisingly, the argument is missing in the modern text kicking off the economic theory of democracy: Joseph Schumpeter, *Capitalism, Socialism, and Democracy* chs 21-23 (Allen and Unwin 4th ed 1954) (discussing why voters do not vote well and the laws of the classical theory of democracy); so too, for the most part, Anthony Downs, *An Economic Theory of Democracy* ch 3 (Harper Collins 1957) (discussing how a rational person votes, not why a rational person would not vote). But see *id* at 265-67, for some (faltering and inadequate) recognition of the problem. Thanks to Jenny Mansbridge for bringing this passage to my attention.

ride on others' efforts. (If you try to cast the norm promoting voting as an attempt to overcome a collective action problem, the obvious response is that it's still rational not to vote: better to let those norm-adhering chumps do it.²⁴) Take applauding at the end of a good concert or dramatic production. Does—should—the economist in the audience think, “why should I applaud? It's costly, it expends calories, it makes my palms smart, there's some risk of injuring my wrists, it makes no appreciable difference in the decibel level in the hall, might as well let these idiots surrounding me do the work”? Homework assignment for the reader: make a list of five more examples along these lines. Ponder the list. Does it inspire you to change your future actions? Does it make you think you've been irrational? Or does it make you think there's something lunatic in this line of thinking, that this is crackpot rationality?

This is a quick example of the equivocations surrounding utility maximization. For now it turns out that the usual story about why it's irrational to vote just assumes, without argument or analysis, that it's costly to inform yourself about the election, costly to turn out and wait, and so on, and that the only gain on offer is the infinitesimal prospect of determining the outcome. But some of us devour the newspaper and listen to National Public Radio. We get a kick out of showing up at the polls. We enjoy wearing that hopeful little sticker that says, I VOTED. So we prefer to do these things. Why? Maybe we think it's the right thing to do, and that alone, absent further stories about the sanctions third parties might inflict on us for evading our duty, is enough to move us to action.²⁵ Or maybe we understand that the franchise is the decisive badge of full membership in the community, that exercising it stamps us as dignified citizens, an identity we want to affirm. (As usual, the history is illuminating, and this bit of cultural symbolism is part of the fallout of the transformation of subjects into citizens.²⁶ Cooter's tenuous grasp of that history shows up in his claim that “aristocracy assumes that some people have better preferences than others” (Cooter p 264), about which, frankly, the less said the better, though I would prefer to say more, much, much more.)

²⁴ Eric Posner's recent argument, that voting signals to one's peers one's reliability in settings of extended reciprocity, is too clever by half. See Eric A. Posner, *Symbols, Signals, and Social Norms in Politics and the Law*, 27 J Legal Stud 765, 783–85 (1998). Surely there are cheaper ways to do that; the people on line at the voting booth aren't people (1) you're likely to want to cooperate with but (2) who are right at the margin of wondering whether to trust you; as for others, you might as well steal or buy a little roll of the I VOTED stickers and just remember to put them on that day, snickering at the idiots who get theirs the hard way; and so on, and on, and on.

²⁵ For a rehearsal and defense of this Kantian sentiment against recent ambitious economic accounts of norms and principles, see Elizabeth S. Anderson, *Beyond Homo Economicus*, Phil & Pub Affairs (forthcoming).

²⁶ See Don Herzog, *Poisoning the Minds of the Lower Orders* (Princeton 1998).

Imagine the pride with which a 68-year-old black woman in rural Alabama stood in line to vote, for the first time in her life, after the passage of civil rights legislation in the 1960s. Imagine an economist sidling up to her and rehearsing the argument about the irrationality of her doing so. What is wrong with this picture?

So too, many members of the audience burst into rapturous applause because they want to express their gratitude for a good performance. That's one reason Mueller needs to hang onto a distinction between preferences and interests. And that's why economists must argue, not just assert, that voting isn't in our interests. Merely invoking utility maximization, even on the first, substantively selfish rendition of what that means, isn't enough to do the job. Somersaulting among a substantive view that we pursue self-interest, a substantive view that we are public spirited, and a (relatively) formal view that we choose or find intrinsically satisfying various things, is worse yet. Absent some further account, such wobbly, even dizzily careening, talk of utility maximization is just confused, despite the imposing appearance of analytic rigor.

Mueller's and Cooter's discussions here are haunted by a ghost they wouldn't welcome, the ghost of Hegel, warning against the sterility of imagining that one could be purely normative. (Ghosts, we know, like to trouble those heading off to battle.) Put less theatrically, here surfaces the strain of an exaggerated distinction between positive and normative theory. Mueller and Cooter sense, correctly, that their "normative" arguments have to be responsive to actual practice, have to offer an interpretation of our world that is simultaneously illuminating and critical.

A similar tension animates their vaguely guilty and unabashedly hostile invocations of traditional political theory. Though Mueller's chapters routinely open with long epigraphs from canonical figures, he is brashly ready to break new ground: "Given their faith in mankind's capacity to learn and reason, Jefferson, Madison, and the other Founding Fathers would certainly argue that we should know more today about political institutions than they did, and we should be capable of designing better institutions than they did" (Mueller p 47). (Well, no. Jefferson did want to rewrite the constitution every nineteen years, but that was to insist on the rule of the living, a principle he borrowed from old liberal assaults on feudal regimes of property and brought to bear against constitutionalism. So he was out to protect autonomy, not to make room for progress.²⁷ And Madison dryly dis-

²⁷ *Thomas Jefferson to James Madison*, in Julian P. Boyd, ed, 15 *The Papers of Thomas Jefferson* 392, 396 (Princeton 1958) (discussing how every constitution "naturally expires at the end of 19 years" and this effect on property).

tanced himself from such ideas, insisting that special circumstances enabled the founding generation to hammer out a good constitution and that it would be rash to imagine those circumstances would continue. Instead, Madison hoped that later Americans would venerate the founding generation.²⁸) So too, Cooter reports that he is fond of various works of political theory.²⁹ He adorns his text with occasional citations to canonical political theorists, whom I regret to report he seems to have a knack for flattening or getting wrong.³⁰ (This news is particularly rotten for students, who might rely on this textbook for authoritative guidance here, too.) In one breath he frets that economists and philosophers are prone to misunderstand each other; in another he dismisses philosophers as people more concerned with the meanings of words, with what things really are, than with practical judgments of value and consequences (Cooter p 3). Readers will be well served by keeping in mind a gloss Cooter finally offers in closing: “The strategic theory of democracy developed in this book relies on the positive methodology of individual rationality and the normative standard of preference satisfaction” (Cooter p 378).

Externalities

Next, consider externalities. Sometimes markets fail, agree economists, though it is controversial just when they do, controversial too whether state intervention would improve matters. And sometimes they fail because the reigning system of property rights doesn’t force actors to internalize all the costs of their actions. More generally, if—to be loose about it for a moment—goods or bads accrue to other actors in ways that prices and property rights aren’t capturing, market outcomes won’t produce efficiency. Sometimes the remedy is to write a better system of property rights. But sometimes we won’t be able to. So far, so familiar: but I want to argue that the criteria economists actually use to identify externalities—inside and outside market settings, promiscuously, unhesitatingly—come from moral and political theory, not their own views about utility maximization.

Mueller offers this example:

²⁸ Federalist 49 (Madison) and Federalist 50 (Madison), in Isaac Kramnick, ed, *The Federalist Papers* 312–18 (Penguin 1987). Contrast Mueller’s worries at p 80.

²⁹ For instance, see Cooter p 12.

³⁰ Note Cooter p 61 on Carl Schmitt whose friend/enemy distinction, highlighting cleavages that can always lead to mortal combat, simply does not mean that bargaining games are zero-sum. Or take Cooter p 203, claiming that Kant “does not think that morality depends on an act’s consequences.” This is at best a highly elliptical and grossly misleading formulation, since the categorical imperative depends on our imagining the consequences of universal adherence to a practical maxim we are considering adopting. Or take Cooter p 283 on Aristotle’s alleged opposition to free markets, or Cooter p 372 on Plato’s alleged contempt for empirical knowledge, or

Individual *R* practices one religion and everyone else practices other religions. *R*'s religion commands her not to comb her hair. The sight of *R*'s uncombed hair causes other members of the community some slight irritation. The unhappiness *R* or any other member of the community would experience, if she had to violate one of the commands of her religion, is quite large, however (Mueller p 213).

Cooter offers this example: "When supplying water to residents (positive internalty), a local government may degrade the water available in other localities (negative externalty). Pollution is a harmful *by-product*" (Cooter p 109). The reader jumps to the conclusion that *R* will be permitted her disheveled hair, but the local government won't be permitted to spew out pollutants. And the reader is likely to supply the underlying intuitions that make the examples work: *R* has a right to her uncombed hair (even if we may socially disapprove). She'd even have that right absent her religious convictions, which give us more emphatic reason to insist on her right. So too those downstream have been harmed by pollution. Their interests have been affected adversely in unjustifiable ways.

Now what would make sense of rights and harms within the framework of utility maximization or preference rankings? Whenever I have preferences over your actions or their effects, we have an externality. We can see the point by choosing examples not designed to flatter our liberal sentiments. Suppose June is horrified at the very thought that the lesbians down the hall are engaging in oral sex. Yes, they're consenting adults, acting in private. But their doing so, she thinks, is disgusting. Their actions move her to a lower indifference curve. Maybe a much lower indifference curve: maybe the thought makes her physically ill. Maybe this is a visceral reaction, or maybe it flows from her deepest religious commitments. Either way, it's a social cost they don't have to internalize. More bizarre yet, suppose June vigorously disapproves of those who *do* comb their hair, or wear business suits to work, or insist on being addressed as "Professor." Every time someone does such a thing, she winces. ("Repressed middle-class snobs," she fumes.) As far as utility and preference go, here again we have externalities literally indistinguishable from those generated by *R* and by the polluting municipality.

A thoroughgoing utilitarian or welfare economist might bite the bullet and agree: okay, all these cases are the same, so they all should be treated the same way. Surely logic doesn't rule that response out. But adopting it is batty. Not primarily because in fact we have endless preferences about each other's preferences and actions, so that judgments about social welfare or efficiency are likely to become intractable. But because the brute fact that someone else prefers that you do

or don't do something doesn't give you a reason to act or to evaluate an action any differently. Back to the ice cream parlor. You step up and confidently order vanilla. "Vanilla?!" barks the pimply-faced student working the counter. "*Vanilla?!!*" And the place erupts into feverish denunciations, patrons glaring at you with unabashed hostility. You notice only now that each and every one of them is eating chocolate, that the walls are studded with revolutionary posters denouncing the boring vanilla lobby, and that an ominous fellow by the door is fingering his dagger.

If the only conceptual resource we have on offer for thinking about such matters is preference, these are externalities. And we can imagine the usual transactions to produce more efficient outcomes. Maybe the lesbians should have to offer June financial compensation in order to go about their business. (It being *their* business, in this view, can't be at bottom any claim of individual rights or personal autonomy. It's just something they want to do, and their wants have no better standing than others' wants that they not do it. Or try this: the women in question are decidedly chaste, even ascetic, but their neighbors are glutting themselves on voyeuristic fantasies of watching them perform. Should the neighbors offer the women cash payments to have sex? Should the women have to offer the neighbors cash payments if they don't want to? Should we shrug off these matters by saying that Coase has shown that assuming low enough transaction costs and given any initial entitlements parties will bargain their way to socially efficient deals?) Maybe you should have to pay off the other patrons if you order vanilla.

Economists are ordinarily too sensible to parade such fantastic arguments. But that's because economists are opportunistic about invoking externalities. They do so not whenever we find people with preferences about others' preferences and actions; they actually do so in ways closely tracking the traditional harm principle of liberal theory. (Cooter's treatment of racial discrimination in housing markets (Cooter ch 14) is open to the same sort of objection. He imagines individuals, one by one, each with consummate rationality, reacting to changes in the racial composition of their neighborhood by moving out. But their individual actions might yield massive social swings they don't prefer. Readers should think about the ways in which all kinds of consumer markets lead to snowballing and unravelling effects, with the options and prices available to any individual consumer systematically shaped by others' preferences. Blue jeans are cheap because lots of other people like them; over the long haul, increased demand can lower prices by leading to increased production and economies of scale; as the price comes down, more and more consumers switch over and don jeans. Other clothes are prohibitively expensive because lots

of others don't like them. The logic here impeccably tracks that which Cooter uses to explore discrimination, but no one ever suggests that we worry about market failure when it comes to clothing. So too his treatment of discrimination in labor markets is open to the same kind of objection. He worries here about the reliance on proxy judgments from casual statistical information or impressions, and suggests that the state should offer better information (Cooter pp 349–50). But people in zillions of other market settings rely on such proxies and faulty information and no one raises an eyebrow.) Though it's sticky, we need to distinguish *harms*, unjustifiable intrusions on others' interests, from *hurts*, ways of bugging them that, however painful, don't give them any legitimate claim against us.³¹

And I see no reason to believe that those two competing approaches—(1) toting up when people have preferences about others' actions and (2) identifying harms—are going routinely to converge on the same outcomes. The ice cream parlor example may seem fanciful; here it does seem plausible to say that as a general matter, at least, people don't much care what flavor others order. (Even here, let's pause: what if you're about to order the very last scoop of vanilla and someone behind you swoons or yelps, manifesting an urgent preference for it? Should you have to bargain with her? That is emphatically not the same question as, wouldn't it be nice of you to let her order it instead?) But lesbian sexuality just isn't like that, and neither are a host of other things. There is no systematic connection between preferences and legitimate interests. People may not have intense preferences, or any preferences, about legitimate interests and harms; people may have preferences, even intense preferences, about things others do having nothing to do with legitimate interests or harms.

This is because the notion of human welfare figuring in conventional moral and political theory is *not* a matter of realizing one's preferences, occupying a higher indifference curve, maximizing one's utility, or anything like that. Human welfare is an evaluative notion, all the way down. It's just another example of a realm in which we assess competing conceptions with reasons, criticisms, and justifications, in

³¹ I don't know of a fully satisfactory account of the harm principle. Joel Feinberg's magisterial *Moral Limits of the Criminal Law*, in his *Harm to Others* 57 (Oxford 1984) slips into arguing that individuals have an interest in something if it's instrumentally required to advance their ends. This won't do: suppose Anthony Comstock says, sincerely, "My end is purifying the sexual morality of these United States." Then he gains an interest in others' sexual behavior, and their misbehavior can be taken as harming him. Feinberg suggests that empirically such cases don't arise (much?), but this won't do. So there's some pressure here to retreat and say, only "self-regarding" ends—recall John Stuart Mill, *On Liberty*—will qualify. But that won't do either, in part because it underwrites the liberal harm principle with an egoistic conception of individualism liberals have good reason to disavow.

which the brute fact of preferences is neither here nor there.³² Remember, we can't sensibly say that Dolphy is worse than Barenaked Ladies because more people express a preference for the latter. And we can't sensibly defend some picture of human welfare or autonomy or individual rights by canvassing preferences about it. Suppose we're wondering whether adults should have a right to engage in any consensual sexual activities they like. We don't ask simply whether or not people prefer that there be such a right; nor do we ask whether granting the right seems on balance the best way to maximize utility. We ask if such a right works to safeguard the pursuit of enterprises genuinely important in life, whether preferred or not, if it helps define one as a dignified social actor, whether one cares or not, and so on.

There is a motivation we might borrow from moral and political theory for insisting on utility or preference as paramount, and that's our commitment to autonomy. We should, one might think, let people pursue their preferences. Opening a space between their preferences and their welfare might seem an unholy recipe for paternalism run rampant or vanguard politics. (Think about the explicit commitments—and unacknowledged debts—built into the concept of consumer sovereignty.) But this is to dodge a complex argument that we really have to engage on the merits. We need to be able to show that in many cases people have a right to do what they like, even if they don't act in their own interests, because the right is itself constitutive of autonomy and autonomy is partly constitutive of human welfare, of a life worth living. If we dodge this admittedly ambitious and difficult argument, we really have no alternative but to concede that *R* and the polluter and the lesbians and the person daring to order vanilla all, in principle, should be treated precisely the same way. And that can't be right. Put differently, that the organizing categories of economic analysis provide no way to distinguish these cases gives us no justification for refusing to distinguish them. It just reminds us that the economic categories don't have enough moving parts, that the invading troops are armed with blunderbusses.

So it looks like the economists' invocations of externalities are invidiously opportunistic, that the concept is secretly parasitic on the liberal harm principle. But nothing within economic analysis generates or supports such a principle. So too, I want next to argue, Mueller and Cooter think about preference aggregation and the social welfare function in ways heavily but covertly dependent on fairness.

³² On these matters, consider T.M. Scanlon, *Preference and Urgency*, 72 J Phil 665 (1975).

Preferences And Fairness

Let's return to "the normative standard of preference satisfaction." What justifies adopting this as our standard? More important for my purposes here, how should we decide among competing conceptions of preference satisfaction? Neither question can be answered by appealing to preference satisfaction, lest we lapse into a vicious circle. Neither can be answered as if it were a technical problem in the theory of rational choice, because the answers have huge and transparent moral and political importance.³³

Mueller sometimes sounds as though he thinks he can make short work of these matters:

As the underlying behavioral postulate for the purely positive analysis of all human behavior, the applicability of the rational self-interest assumption can be challenged. But as the foundation of a *normative* analysis of political institutions, the assumption seems unassailable. Even if individuals do not always act in perfectly rational ways, they would presumably wish to be governed by those institutions that they would rationally choose (Mueller p 50).

The idea of hypothetical rational choice is familiar and powerfully attractive, thanks to Rawls. But it isn't unassailable. And everything will depend on how we describe the choice situation: recall the movement in Rawls from the initial situation, the general idea of such a choice situation, to the original position, the philosophically favored interpretation of the initial situation.³⁴ (So arises a powerful skepticism about contract arguments: tiny changes in the characterization of the initial situation can lead to huge changes in the principles rational agents would adopt and that are, on that ground, allegedly justified. Contract arguments are amplifying devices. I myself am willing to accept the force of the skeptical claim and swear off contract arguments. It's incumbent on those offering them to be meticulous in describing and justifying their particular characterization of the initial situation.) Much will depend not just on the parties' knowledge and motivations, but on what account of rationality we adopt. It begs the question to assume that the right account is utility maximization, as if that were the only game in town.

Later on, Mueller, in the first-person plural that haunts textbooks (the conqueror dreaming of royal title?), says confidently, "[W]e presented arguments for why individuals at the constitutional stage would

³³ Here I am borrowing observations from my *Without Foundations: Justification in Political Theory* 131–32 (Cornell 1985).

³⁴ John Rawls, *A Theory of Justice* 121–22 (Harvard 1971).

unanimously agree on institutions that maximized a social-welfare function" (Mueller p 120). I found this reminder astonishing, partly because there are deep reasons to associate contractarian arguments with Kantian views, not utilitarian ones. (Not that you can't gloss an initial situation to derive utilitarian principles—Harsanyi does, and it's been seriously suggested that even Rawls inadvertently does³⁵—but because there's no point cranking up the elaborate machinery of contractarian arguments for such purposes.) Astonishing too because Mueller must be referring to his brutally compressed and hasty (two-page) discussion of Buchanan and Tullock, Rawls, and Harsanyi, and the "arguments" in question are full of yawning gaps, only some of which are explicitly signalled by the repeated appearance of "If," a conditional conjecture or promissory note standing in for what would have to be sustained and careful argument (Mueller pp 63–64). That telegraphic bulletin is followed by an equally hasty (three-page) discussion of a social contract in which people know what positions they will occupy in society. Jarringly, he responds to doubts about the cogency of this argument with claims about the social conditions under which actual constitutions are written (Mueller pp 65–67). Despite the sanguine first-person-royal reminder, then, the discussion on offer qualifies only as a cursory, even abrupt, canvassing of different ways of thinking about social contract arguments. It settles nothing.

Its rapidly shifting terms, though, might be diagnosed this way. Suppose Mueller has commitments to treating individuals fairly, but doesn't see any straightforward way to accommodate those commitments in a classic utility-maximizing social welfare function, and doesn't want to explore (or doesn't feel comfortable exploring? or doesn't know how to explore?) competing accounts of what fairness requires. Then we should expect to see precisely what we do see, which is a jerry-rigged argumentative apparatus tricked out with occasional special pleading and ad hoc maneuvers. Mueller recurs repeatedly to a unanimity rule. But unanimity rules are notoriously suspect in the world of strategic rationality, since they encourage holdouts, hyperaggressive bargaining, and other extortionate behavior. The real appeal of unanimity is that it dramatizes the intuition that a constitution could be seen as making each and every one of us better off. And a social welfare function maximizing total utility across the population makes no such promise. It can mandate making some worse off to make others better off.

³⁵ Harsanyi's key papers are collected in John C. Harsanyi, *Essays on Ethics, Social Behavior, and Scientific Explanation* (D. Reidel 1976); David Lyons, *Nature and Soundness of the Contract and Coherence Arguments*, in Norman Daniels, ed, *Reading Rawls: Critical Studies on Rawls* 141 (Basic Books 1975).

So too Mueller invokes the merits of Pareto optimality. But the standard social welfare function, the one he says he has argued for, the one he sometimes uses, gets along quite nicely with—in fact, requires—Kaldor-Hicks efficiency, not Pareto optimality. (Kaldor-Hicks efficiency approves all changes increasing total welfare, so that the better-off parties can afford to compensate those worse off, *even if they never do*. Pareto optimality approves only changes making no one worse off.) So too he touts the merits of Nash's solution to the bargaining problem over consumer surplus, which, again, dictates that the parties evenly split the gains. But within the world of utility maximization, the Nash solution has nothing to recommend it. And I mean literally, strictly speaking, precisely nothing. The appeal of splitting the difference is just an appeal to fairness (half-disguised as symmetry in Nash). But it can't be generated as any kind of focal point or intuitively obvious solution without an appeal to fairness. It is no better a focal point, as far as that goes, than the policy of assigning all the surplus to the party that moves first.

Cooter's account is no better, just as brief, cryptic, and indecisive. He introduces the idea of a constitution as a hypothetical social contract, but like Mueller, he ignores the Kantian underpinnings of contract arguments and blithely invokes the economics of bargaining games (Cooter p 273). So we get a sunny affirmation of "to each according to his threat advantage," or, in Cooter's actual words, "each party must receive at least his threat value, which equals the payoff that he can obtain on his own without cooperation of others" (Cooter p 274). We then get ferociously compressed (just over two pages) and misleading accounts of Hobbes, Locke, and Rawls, with a concluding diffident shrug of the shoulders: "Each approach presumably leads to a different point on the welfare frontier in Figure 11-1" (Cooter p 276), a figure charting possible after-tax incomes in a two-person economy (Cooter p 262). Yes, precisely, and it matters which we choose, and a book proposing to explore, explain, and justify various constitutional rules and even particular legal doctrines³⁶ can't afford to be cavalier about this. Which approach we choose bears not only on distributing the gains of economic cooperation, but on one topic after another the book is allegedly devoted to exploring. Cooter can't simultaneously tell us that he will rely throughout on "the normative

³⁶ See especially Cooter, ch 13 on free speech, riddled with elementary mistakes of law I won't explore here only because they are incidental to evaluating the general merits and demerits of economic analysis in this realm. Briefly, he seems not to notice that all of First Amendment law has an implicit state action requirement; and his proffered reconstruction of the liability standards enshrined in *New York Times v. Sullivan*, 376 US 254 (1964), and ensuing cases, balancing the cost to the reporter of further investigation against the benefits to society, doesn't come close to getting the actual case law right.

standard of preference satisfaction” and refuse to unpack and justify a particular account of what that means. Again, absent careful justification we have no reason to adopt *any* version of preference satisfaction, nor any way of knowing which interpretation of such a view we should be depending on.

Like Mueller, Cooter furtively acknowledges that we might want to make room for fairness in our stories about preference aggregation, though for the wrong reason, or in the wrong way, that is just because the people we are modeling might prefer fairness. Take the experimental game theory setting, “ultimatum,” where one player proposes the division of a dollar into two parts. The second player may accept the deal, in which case each pockets the proposed shares; or the second may reject it, in which case each gets nothing. Economic rationality dictates—assuming that each player wants only to maximize his share of income—that the first player propose that he get 99¢ and that the second agree, because he’s better off with 1¢ than with nothing. In fact, many first players propose a fair split of 50¢ apiece, and many second players reject unfair deals. Cooter’s response: “Insofar as these experiments with college students apply to career politicians, the economic models require modification to allow some role for intuitive concepts of fairness” (Cooter p 220). But this is not just to wobble back to the second, formal interpretation of utility maximization that Cooter disavows. It’s also to wobble back toward mechanically “positive” theory. If Cooter is serious about going normative, he has to tell us how he construes fairness and how and why it should matter. Else we have the same confusion made legendary—in some circles—by Milton Friedman’s argument that people who believe market outcomes are unfair have no complaint against market outcomes, because their preferences are already taken into account by the market.³⁷ People who think market outcomes are unfair aren’t expressing a preference to be taken into account in the usual way on the market. They’re denying the legitimacy of the market itself.

Coda

I want to close with two remarkable examples from Mueller. Majority rule, Mueller has been claiming, makes sense, when it does, if people’s preferences are equally intense.

Now consider an issue in which the equal intensity assumption is less plausible, a bill to prohibit gays from kissing and other acts of affection in public. The assumption that the gain to an individual on one side of this issue is the same as to a person on the other

³⁷ See Milton Friedman, *Capitalism and Freedom* 161–63 (Chicago 1962).

side is less plausible. Majority rule treats this and all other issues the same. Each is decided as if the intensities of preferences on both sides of the issue are equal (Mueller p 159).

Well, I'm ready to consider it, but this is the whole of Mueller's abortive discussion. So I'll fill in further discussion for him, if not in quite the way he probably had in mind. Mueller must think the moral of the story is that we shouldn't let a mere (homophobic) majority outvote a gay minority. But his way of securing this is to insinuate that the homophobic majority has lackadaisical preferences, while the gays care quite a lot. That, as we say in the trade, is an empirical conjecture. If all the resources we can bring to bear are those of the utility-maximizing social welfare function, we have to calculate some magnitudes, one formalization of which would be:

$$L = \sum U_i \text{ (gays permitted to kiss)}$$

$$I = \sum U_i \text{ (gays forbidden to kiss)}$$

where L is, let's say, the summed liberal preferences of the population, I the summed illiberal preferences. ("Gays permitted" and "gays forbidden" will have to refer both to the actual policy adopted, whether there is a right or not, and the expected frequency of gay kissing under each regime.) And then, hey presto!, the social-welfare function decrees that gays should be permitted to kiss if and only if $L > I$.

Mueller is thinking, I bet, that gays care passionately about their right to kiss in public, so their intense preferences will enlarge the magnitude of L . And he may be thinking that straights don't care much one way or the other. It might be churlish to suggest that some gays don't strongly prefer the right to kiss in public. But it's got to be true, as a matter of fact—and the brute facts are decisive when we think this way—that there are many more straight people, that many of them are homophobic, and that some of them in turn are intensely homophobic. I have no systematic empirical evidence to offer, but my hunch is that I has to be bigger. Much bigger. Even in allegedly hyper-liberal Ann Arbor, many look askance at gays kissing in public. Not many miles from here, gays who dare to do so will have rocks thrown at them or worse. Arguments for gay rights—or, better, for a right of sexual autonomy applying impartially to straights and gays alike—have to proceed on another footing. And it would be philistine to suggest that that means they are covertly antidemocratic, as if democracy were nothing but preference aggregation.

The second example occurs during Mueller's account of poor R , whose religion forbids her from combing her hair. " R could be compelled to comb her hair only if she willingly agreed to do so, as she might if she were convinced by the rest of the community that their

suffering was severe enough, or she were offered a sufficiently large bribe” (Mueller p 214). Once again, the lack of concrete sociological detail makes it easy, maybe easier, okay, so not impossible anyway, to ascend to the invidiously abstract level of preference. But who in the world is *R*? (I mean that question quite literally.) Suppose—I shall have to vary the example just a bit, but you will forgive me—*R* is a Rastafarian, recently settled in a white working-class neighborhood. Her dreadlocks drive the neighbors crazy, as do her brightly colored clothes. And they wonder, just what is the story on Rastafarians and their endless use of marijuana? Is it a real religion? Or a pretext for getting high? And they shudder as their kids react to her as a new, intoxicatingly seductive Pied Piper. So they offer to pick up her next twelve mortgage payments if she’ll shave her head. Or suppose *R* is a Lubavitch Jew living in Crown Heights, Brooklyn, a community with an inglorious history of racial and ethnic conflict, not to say murders. As is customary, she keeps her hair assiduously covered in public. Knowing that her family is very poor, wishing to visit some caustic humiliation on her, some of her black neighbors publicly offer her \$2,500 if she will rid herself of the scarf and sport dreadlocks instead. Or suppose the city Chamber of Commerce, worried about declining tourism, offers neighborhood blacks and Jews alike hefty cash bonuses for dropping their signature hairstyles and doing their desperate best sedulously to ape middle-class WASP hairstyles. Just these bits of supporting social context, I think, help us bring sharply in focus what would be disturbing about Pareto-optimal exchanges on such matters—even what would be disturbing about venturing the offers, even if they were spurned. (Contrary to another economists’ dogma, you can be worse off for having an additional option, even if you’re free to reject it, not least because of what a hateful offer might do to your relationship with the person extending it.)

But I don’t want to quibble with the framing of a hypothetical example. So let’s leave her *R*, in faceless anonymity, and let’s return to Mueller’s comment, worth repeating and lingering over: “*R* could be compelled to comb her hair only if she willingly agreed to do so, as she might if she were convinced by the rest of the community that their suffering was severe enough, or she were offered a sufficiently large bribe” (Mueller p 214). How can someone be compelled to do something she willingly agrees to do? The oxymoronic language, again, is symptomatic of a subterranean background issue. Suppose “the community” whines a lot about how violently they cringe at the noisome sight of *R*’s unkempt locks, or—one shudders at the prospect—draws up and presents her with a contract promising cash payments for every quarter in which she faithfully (but faithlessly) combs her hair. Would her agreement actually be voluntary? Here’s another contested

concept that economic analysis just doesn't give us a handle on. My own view is that whether *R*'s choice is voluntary will depend on whether she has reasonable alternatives.³⁸ And—guess what?—*that* question is not a matter of assembling any number of preference rankings. You don't have to be a student of social control to notice that others' sustained and vehement disapproval of your actions can in fact force you do something, to do, as we'd say, what you have to do. Sure, you choose it. You also choose, after consulting your preference ranking, to give the gunman your money rather than your life. But that doesn't make either choice voluntary. Like a mugger's victim, *R* may be making the best of a bad situation, and it may be true that when she buckles and agrees to comb her hair, she is making herself better off than she would be otherwise. But that simply doesn't legitimate the transaction; it doesn't show that her choice is voluntary. Mueller's curious language—"compelled . . . if she willingly agreed"—betrays his uneasy awareness that he's navigating tricky shoals. His instincts are better than his theory.

So too, one might wonder why Mueller (rightly!) describes the possible cash payment as a bribe. When is a payment a bribe? When the cash transaction is impermissible, when the seller shouldn't be selling or the buyer shouldn't be buying. Contrast the kid in the ice cream store selling you vanilla and a professor selling an A for \$500 to a student who otherwise would have gotten a B. Third parties might object to the latter transaction, sure, but we've already seen that they object to the former, too; and we wouldn't say you were bribing the student to get the vanilla. We would say that, to be sure, if his employer had told him not to do it: here a principal/agent relation properly binds the agent. But not all instructions from principals properly bind agents—we needn't reach as far as instructions from military superiors to shove the Jews into the ovens to remember the point—and we needn't have principal/agent relations to make sense of impermissible payments. The community would indeed be bribing *R*, because it shouldn't be making such a hateful offer in the first place, not because the community is the agent of some principal—who could that be?—who's instructed it not to. Yet again, if all we can say about *R*'s predicament is that she prefers not to comb her hair but others prefer that she does, where will the requisite account of impermissibility come from?

The same subterranean issues surface in Cooter's rehearsal of the merits of market exchange. "Market exchange, which is voluntary, tends to move resources from people who value them less to people

³⁸ And here I borrow some thoughts from my *Happy Slaves: A Critique of Consent Theory* 225–29 (Chicago 1989).

who value them more, as required for efficiency” (Cooter p 284). Similarly, juxtaposing market exchange to takings, Cooter avers, “In a sale, ‘voluntary’ means that the owner freely agrees to the price” (Cooter p 284). But is it uniformly true that market exchanges are voluntary, that they feature free agreement of the parties? One could explore well-worn features of contract law to suggest that the answer must be no. Instead, try this: as Karl Marx would later, Adam Smith denied that exchange in labor markets was voluntary. If that gloss seems incredible, here are Smith’s actual words, which depart from the usual happy story of supply and demand:

What are the common wages of labour depends every where upon the contract usually made between those two parties, whose interests are by no means the same. The workmen desire to get as much, the masters to give as little, as possible. The former are disposed to combine in order to raise, the latter in order to lower the wages of labour.

It is not, however, difficult to foresee which of the two parties must, upon all ordinary occasions, have the advantage in the dispute, and force the other into a compliance with their terms.³⁹

Workers, thought Smith, were trapped. Merchants and manufacturers had lots more wealth on hand and so could easily outlast the workers if they audaciously attempted a strike. Smith also was assaulting what he saw as an unjust legal order that granted merchants and manufacturers privileges of associating that it denied to workers, but the cloven foot of state intervention isn’t central for my purposes.⁴⁰ Given a choice between selling their labor and starving, workers have to sell their labor. Smith’s language is deliberate, I daresay perfectly accurate too: they are forced to comply. If they have more than one similar job offer, each of them reasonable, their choice of which job to take is voluntary. Still, their choice to work is not itself voluntary. Here again, some market transfers may be voluntary, but some may not be. Here again, it matters that—and precisely how—we distinguish one kind of transfer from another, because exchange is not as a general matter legitimate simply because it allows parties to ascend in their preference rankings. Here again, no insistent chanting about preferences provides the resources to draw the distinction we need.

Does the economic analysis of democracy, or of constitutions, commit us to howlers like these arguments (suggestions? insinuations? assertions?) of Mueller and Cooter? It depends on what we mean by economic analysis. If that means a usual social-welfare func-

³⁹ Smith, *Wealth of Nations* bk 1, ch 8 at 83 (cited in note 2).

⁴⁰ See *id.* at 82–104.

tion, the answer must be yes, unless again we fiddle in unprincipled ways with the machinery in order to accommodate background intuitions it doesn't itself generate or support. And again my suggestion is that from the category of utility through the category of externality on up, economists are prone to that kind of illicit fiddling, despite their protestations of love of rigor. But if economic analysis means something more modest, the occasional use of particular tools that grew up in that discipline when and where it can be shown that they're illuminating, then no, surely no such howlers are in the offing.

That, however, is to assert again that any competent social or political theorist will have some economics implements in her toolbox, but that only enthusiasts will grab those tools on every occasion. More modest economists wouldn't attempt books like those reviewed here, wouldn't think the project of "working strategic theory pure" in thinking about constitutions or democracy was particularly sensible, unless the goal was to highlight how very much that theory garbles. If the fates are droll enough to sentence political theorists to defeat at the hands of marauding economists, the victors will inherit a terrain they have systematically laid waste—and one they'll be unable to rebuild.

